

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASPLUNDH TREE EXPERT CO.
Employer

and

Case 07-RC-131249

LOCAL No. 876, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.¹

MARK GASTON PEARCE,

CHAIRMAN

NANCY SCHIFFER,

MEMBER

Dated, Washington, D.C., October 2, 2014

¹ We find it unnecessary to consider the Employer's contention that the Regional Director erred in finding that the crew forepersons are not held accountable for the work of the crew members they direct as accountability is only relevant if, in directing their crew members, the crew forepersons exercise independent judgment. We find that the Employer has not satisfied the standard set forth in Sec. 102.67 (c) of the Board's Rules in contending that the Regional Director erred regarding the crew forepersons' exercise of independent judgment in directing the crew members. Specifically, the Employer failed to provide sufficient evidence of this requisite element under Sec. 2(11), as it is apparent that the forepersons' authority to direct is constrained by the Employer's detailed work manifests, company policies, and the general foreman's instructions. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006); *Dynamic Science, Inc.*, 334 NLRB 391 (2001). Moreover, in disagreement with our colleague, we find that the Employer's proffered evidence that crew forepersons exercise discretion in this regard consists of generalized testimony with insufficient detail to prove that their direction of their crew is anything other than routine.

MEMBER JOHNSON, dissenting.

I would grant review, on the issues of whether the Regional Director erred by finding that crew forepersons are not supervisors under the Act because they do not responsibly direct crew members with the requisite independent judgment under the standard of *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). As expressed in *Oakwood Healthcare*: “for direction to be ‘responsible,’ the person directing . . . must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly.” Id. at 691-692.² And, in *Croft Metals, Inc.*, 348 NLRB 717 (2006), the Board found that lead persons were held accountable for the job performance of employees assigned to them where the employer had issued warnings to the lead persons “because of the failure of their crews to meet production goals or because of other shortcomings of their crews.” Id. at 722. A panel majority in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011) narrowly interpreted this standard to preclude a showing of accountability by evidence that putative supervisors had been disciplined for their own work deficiencies. The *Entergy* Board held that the proper evidentiary focus there should have been on discipline of the supervisors for *their supervisees’ deficiencies*. Id. at slip op. at 5-7. In my view, this is an inappropriately narrow interpretation of *Oakwood Healthcare* because certain supervisory duties are inherently linked to the performance of subordinates. A supervisor who is personally judged to be deficient in “management,” for example, is being judged on how poorly his or her group happens to be doing. Thus, both the Board’s decision in *Croft Metals*, above, and common sense dictate that when a putative supervisor who directs other employees is responsible for the group’s performance, as shown either by potential discipline or reward to the putative supervisor on the basis of the performance of the group, or employees within the group, the putative supervisor is “accountable” for the performance of the group and the employees in it. Cf. *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011) above, slip op. at 9 (Member Hayes, dissenting) (“accountability focuses on the supervisor’s own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work.”).

Moreover, the Employer’s evidence showed more than a few examples of the putative supervisor actually being held accountable for *another crew member’s* actions or omissions, or the *whole crew’s performance*. Even under what I view as the over restrictive standard of *Entergy Mississippi*, this suffices as enough evidence of responsible direction to warrant review.

Given that, my focus shifts to independent judgment and discretion. I think this is a close case, but also warrants review. On the one hand, I see merit in the Employer’s claims that the crew foreperson’s role entails inherent use of discretion, because the crew

² The Board clarified in *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), that accountability may be also be shown by the prospect of a positive effect upon a putative supervisor’s terms and conditions of employment. Id. at 731 and fn. 13. I believe that a supervisor’s authority to responsibly direct can also be determined by reference to the incentives, bonuses, and commendations that refer to team performance, although that does not appear to be at issue in this case.

foreperson is onsite directing what is basically the clearing of random patterns of organic foliage, e.g., branches, limbs, trunks (some of which can be quite massive, with the potential for severe damage) from equally random combinations of power lines, transformers, conductors, etc. and must come up with a unique plan for such removal each time. On the other hand, the Employer's various manuals with their detailed instructions could take all the judgment out of these tasks. See *Oakwood Healthcare.*, 348 NLRB at 693 (“[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, [or] the verbal instructions of a higher authority”). However, the Employer has satisfied me at this stage that these two issues warrant a grant of review.

HARRY I. JOHNSON, III,

MEMBER

Dated, Washington, D.C., October 2, 2014